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No. 81271-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF SPOKANE,
Plaintiff/Petitioner,
v.

LAWRENCE J. ROTHWELL
HENRY E. SMITH
Defendants/Respondents.

DEFENDANTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

CENTER FOR JUSTICE
Breean Beggs
WSBA #20795
35 W. Main, Suite 300
Spokane, WA 99201
(509) 835-5211
Attorney for *Defendants/Petitioners*

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A. INTRODUCTION

Pursuant to RAP 10.3(f), an answer to an amicus curiae brief must be limited to new matters raised therein. Here, Amicus argues review is appropriate because Division III's decision conflicts with this Court's decisions in *State v. Canady,* 116 Wn. 2d 853, 809 P.2d 03 (1991) and *In re Dillenburg v. Maxwell*, 70 Wn. 2d 331, (1966), *modified*, 70 Wn. 2d 331, 422 P.2d 783 (1967), *cert denied*, 386 U.S. 998, 87 S. Ct. 1320, 18 L. Ed. 2d 348 (1967). (Amicus Bf. at 2, May 8, 2008.) Specifically, Amicus claims that if the Spokane Municipal Department was not properly created, Defendants' convictions are still valid as they were entered by a District Court Judge with statutory authority to hear such cases. *Id.* Or in the alternative, the convictions should stand because the department was valid and only the selection of judges was defective thus creating a *de jure* office with *de facto* officers. *Id.*

As the alternative issue was previously briefed, Defendants herein address only the first claim as to which they maintain Amicus has misread *Dillenburg* and *Canady. Dillenburg* is inapposite as there was no question of an improperly created court while *Canady* supports Division III's holding that where there is an improperly created court, the acts of its officers are void.

B. ARGUMENT

The difference between *Dillenburg* and this case is fundamental. The issue in *Dillenburg* was whether a faulty transfer between valid divisions of the superior court required vacation of a conviction. In that case, a juvenile defendant argued that the superior court did not have legal authority over his case where his transfer from juvenile court was faulty. This Court agreed that, without the procedural safeguards of a transfer hearing, the conviction could not stand. To remedy this defect, the Court remanded the case for a full hearing with constitutional safeguards to determine whether the transfer was warranted. If it was, the conviction could stand. If not, the defendant was entitled to another trial in the appropriate court.

As clarified by this Court on rehearing, the decision was not based on jurisdictional deficits. As the Court explained:

> "When, then, we spoke of 'surrender of jurisdiction' and 'jurisdiction' in reference to juvenile and superior court proceedings in our original opinion in this case, we were not accurately using the word 'jurisdiction' in its true juridical and traditional sense. More properly, we were referring to the procedural steps required by our Juvenile Court Law and by due process concepts whereby the superior court, sitting in juvenile court 'session,' grants to prosecuting officials the 'authority to proceed,' in an appropriate case, with the criminal prosecution of a child under 18 years of age."

Dillenburg, 422 P.2d at 788.

The authority of juvenile courts was revisited by this Court thirty years later in *State v. Werner*, 129 Wn. 2d 485, 918 P.2d 916 (1996). In *Werner*, Dyer, an adult defendant, sought to suppress evidence obtained pursuant to a search warrant issued by the juvenile court. Relying largely on *Dillenburg*, the Court found that the juvenile court, as a division of the superior court, had jurisdiction to issue search warrants. Once more, the Court felt compelled to explain its use of the word "jurisdiction" in this context:

> "There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment." *Marriage of Little,* 96 Wash.2d 183, 197, 634 P.2d 498 (1981).
>
> The Pierce County Superior Court had subject-matter jurisdiction over Dyer for the crime Dyer allegedly committed in Pierce County, under both WASH. CONST. art. IV, § 6, and RCW 2.08.010 (setting forth the jurisdiction of superior courts), even where Dyer's case was improperly captioned as an adult court case. Personal jurisdiction stems from RCW 9A.04.030(1), which establishes state criminal jurisdiction over persons who commit crimes in the state. *State v. Breedlove,* 79 Wash.App. 101, 111, 900 P.2d 586 (1995) (Pierce County Superior Court had both subject matter and personal jurisdiction over defendant who was arrested in King County for murder committed in Pierce County).
>
> By statute, however, only the juvenile division of the Pierce County Superior Court had the power to hear and determine the case against Dyer, and to render judgment against him. The issue, then, is not whether the adult

> division of the Pierce County Superior Court had the power to hear and determine the charges against Dyer. It did not. The real issue is whether the adult division had the power to issue a warrant to arrest Dyer.

Werner, 129 Wn. 2d at 493-94.

In both *Dillenburg* and *Werner*, this Court not only affirmed the jurisdiction of superior court judges to act in criminal cases, juvenile and adult, but also clarified under what circumstances juvenile and superior court departments had the power to hear and determine such cases and what procedures were required for transfer between the two. However, in neither case was there any question regarding the legality of the departments.

By contrast, here in Spokane there was no properly constituted municipal court to effect a transfer. As stated by this Court in *Werner*, had the court been invalidly created the holding there would have differed. "This is not a case like *State v. Canady,* 116 Wash.2d 853, 809 P.2d 203 (1991), where the warrant was issued by a pro tempore judge of an invalidly created municipal court. That judge had no legal capacity to issue the warrant." *Werner,* Wn. 2d at 495 fn. 3.

In *Canady*, this Court invalidated a conviction resulting from a search warrant issued by a judge pro tempore sitting as a separate department of the municipal court which had been invalidly created.

Canady, 116 Wn. 2d at 858. In *Canady*, there was no indication that the judge pro tempore's appointment was improper or that he could not have handled matters from other, properly constituted departments. Rather, he was allowed to function not simply as a municipal court pro tempore judge, but as his own department which had never been validly created. *Id* at 855. The issue was not whether this judge lacked authority to act in cases such as that before him, but whether the department itself was valid. As the Court explained:

> "[T]he appropriate rule here is that stated in *Higgins v. Salewsky*, 17 Wn. App. 207, 212, 562 P.2d 655 (1977):
>
> Under a constitutional government such as ours, there can be no such thing as an *office de facto*, as distinguished from an *officer de facto*. Hence, the general rule that the acts of an officer de facto are valid has no application where the office itself does not exist. (citations omitted)

Id. at 856-57.

This case is the same. Here, as in *Canady*, the District Court judge had statutory authority to hear cases such as that before her. Here, as in *Canady*, the municipal department had statutory authority to hear cases such as that before it. Here, as in *Canady*, the municipal department had to be separately created from the court of which it was a part, through procedures mandated by the legislature. Here, as in *Canady*, no official attempt was made to create the department using the mandated

procedures. Here, as in *Canady*, there was no *de jure office* and hence no *de facto officers*. Here, as in *Canady*, the proper remedy was vacation of the convictions and not transfer or remand to a properly created court or department thereof.

The issue here is not one of "jurisdiction," as clarified in *Dillenburg* and *Werner*. Rather, it is one of invalid courts. Because of the invalidity, there could be no transfer by default, as urged by Amicus. Moreover, the transfer statutes cited to by Amicus (Amicus Br. at 8) were not enacted to save governmental entities from flagrant failure to properly create municipal departments. Rather, they were enacted to effect timely transfer of pending cases between courts during reorganization pursuant to the adoption or amendment of districting plans. RCW 3.38.031. These statutes contemplate transfer to and from competent courts. Here there was no such court and, as the decisions in *Canady* and *Werner* show, that makes all the difference.

C. CONCLUSION

Because the *Rothwell* decision does not conflict with *Canady* or *Dillenburg*, review by this Court is unnecessary. Furthermore, there is no

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precedential value in revisiting the Division III opinion where the City and the Legislature have superseded its issues regarding chapter 3.46 courts.

DATED this 4th day of June, 2008.

Breean L. Beggs, WSBA # 20795
Bonne Beavers, WSBA # 32765
CENTER FOR JUSTICE
35 W. Main Avenue, Suite 300
Spokane, WA 99201
509.835.5211

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2008 I served the foregoing **Defendants' Answer to Brief of Amicus Curiae** by the following indicated method or methods:

[X] by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the persons as shown below, the last-known address(es) of the persons, and deposited with the United States Postal Service at Spokane, Washington on the date set forth below.

Michelle Szambelan
Acting Spokane City Prosecutor
909 W. Mallon
Spokane, WA 99201

Charles Wiggins
Wiggins & Masters
241 Madison Ave N
Bainbridge Island, WA 98110

[X] by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the persons as shown below, the last-known address(es) of the persons, and deposited with the United States Postal Service at Spokane, Washington on the date set forth below.

Tim Donaldson
Attorney at Law
15 N. 3rd Avenue
Walla Walla, WA 99362

DATED this 5th day of June, 2008.

Susan McWhirter

Susan McWhirter, Paralegal